Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

HISTORIC GREEN SPRINGS, INC.,

Petitioner,

vs.

VIRGINIA VERMICULITE, LTD., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

DENNIS C. O'DONNELL
Counsel of Record
SCHULTE ROTH & ZABEL LLP
900 Third Avenue
New York, New York 10022
(212) 756-2000

CHARLES H. MONTANGE
426 NW 162d Street
Seattle, Washington 98177
(206) 546-1936

Of Counsel:

HARRY S. DAVIS
STEPHEN P. DAVIDSON

Attorneys for Petitioner

Date: March 24, 1999

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Historic Green Springs[1] respectfully submits this reply brief in further support of its petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

I. THE CIRCUITS ARE PLAINLY IN CONFLICT ON THE SOLE ISSUE BEFORE THE COURT ON THIS PETITION

VVL's wide-ranging assertions notwithstanding, this case, insofar as it relates to Historic Green Springs, has nothing to do with a "monopolist's antitrust duty to deal," the "special doctrine prohibiting a monopolist from buying up and suppressing necessary inputs," or any claims to *per se* antitrust immunity for non-profit organizations. (VVL Br. 13, 2, 8.) Nor can the Court's decision as to certiorari turn on VVL's largely unpleaded and specious contentions regarding the nature of the relevant market, HGSI's "non-preservationist" goals, or any alleged "financial payoff" to HGSI as a "receiving charity." (*Id.* 1, 3, 7.) Rather, one question and one question only is before the Court on this Petition: whether the Fourth Circuit's decision that HGSI's conduct in accepting the Grace Donations was "fundamentally commercial" is in conflict with the decisions of other courts of appeal on the same issue.

VVL's convoluted prevarications aside, the answer to this question is plainly "yes." Indeed, the very standard proposed by VVL, as embodying the Fourth Circuit's reasoning, only highlights the conflict between the Fourth Circuit's decision on this issue and the decisions of other circuits. VVL now contends that "the cases uniformly hold that non-commercial restraint doctrine turns *not* on whether a party has non-profit *status* or non-commercial *motives* but rather on whether the *activity restrained* is non-commercial." (VVL Br. 8.) VVL's focus on the nature of the "activity

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[1] All capitalized terms herein have the same meaning assigned to them in the Petition.

restrained" is patently in conflict with decisions—by this Court and the Seventh, Eighth, and District of Columbia Circuits—that have concluded that "non-commercial" conduct that has collateral effects on a "commercial market" is not transformed, solely by virtue of such effects on commercial activity, into "commercial" conduct for purposes of the Sherman Act.[2]

Interestingly enough, VVL's "activity restrained" standard is also inconsistent with the test adopted in the authoritative treatise to which VVL's counsel of record is now a contributor. *See* IA Areeda & Hovenkamp, *Antitrust Law* (1997). Professors Hovenkamp and Areeda proposed therein that:

> The most sensible rule is a strong presumption that a boycott or other claimed antitrust violation is "economic," or commercial, when the antitrust defendants are likely to receive *direct economic benefit as a result of any reduction in competition in the market in which the target firm or firms operate.*

Id. ¶ 262a (emphasis added). This standard's focus on "economic benefit" that can be traced to a "reduction in competition" in a "relevant market" is consistent with the reasoning of the circuit decisions with which the Fourth Circuit's decision is in conflict, with HGSI's arguments as to why its acceptance of the Grace Donations should not subject it to antitrust liability, and with the conclusion that "[n]ot every aspect of life in the United States is to be reduced to . . . a single-minded vision of the ubiquity of commerce."

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[2] *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *National Org. for Women (NOW) v. Scheidler*, 968 F.2d 612 (7th Cir. 1992), *aff'd in part and rev'd in part*, 510 U.S. 249 (1994); *State of Missouri v. NOW*, 620 F.2d 1301 (8th Cir. 1980); *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc.*, 432 F.2d 650 (D.C. Cir. 1970); *see generally* Petition § I.B.

Dedication & Everlasting Love to Animals (DELTA) v. Humane Soc'y, 50 F.3d 710, 712 (9th Cir. 1995). VVL's adoption of an alternative standard in this case suggests that there is conflict on this issue (at least for purposes of this case) even in the world of antitrust academics, which (given the role of academics, generally, in antitrust jurisprudence) suggests, in turn, that the conflict in the circuits on this issue is unlikely to be resolved anytime soon without this Court's intervention.

Thus, this Court should grant certiorari to address the difficult questions raised by the "highly unusual," but far from unique, facts of this case. Framed more expansively (to highlight facts glossed over by VVL), the pivotal question should be whether the mere acceptance of a donation of land by a non-profit organization can constitute "commercial conduct" for purposes of the Sherman Act, where the organization's pursuit of its non-profit mission is conceded not to be a "sham,"[3] the land donated subject to mining restrictions was within a federally-protected National Historic Landmark District,[4] any alleged anticompetitive consequences of the donation remain redressable by virtue of undismissed non-Sherman Act § 1 claims against the donor,[5]

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[3] VVL's current accusations notwithstanding, the Complaint conceded that HGSI was "organized for charitable and educational purposes" and had long "opposed mining and other development in the Landmark district." (Compl. ¶¶ 29, 33.)

[4] That mining restrictions on Green Springs lands should be challenged as an antitrust violation is utterly inconsistent with the National Historic Preservation Act, 16 U.S.C. § 470, *et seq*, and the Mining Within the National Parks Act, 16 U.S.C. § 1901, *et seq*., both of which seek to limit mining activities in congressionally-ratified National Historic Landmark Districts like the Green Springs Landmark District. *See* Petition at 3-5.

[5] VVL's Complaint also asserted Sherman Act § 2 and state antitrust claims, which remain pending as to Grace, and which could provide VVL with a full remedy for any anticompetitive consequences attributable to the Grace Donations, especially if, as VVL argues, the focus of the

Continued on next page

and the non-profit organization's sole impetus for participating in the challenged transaction was the receipt of a donation of land that could in no way facilitate its participation as a competitor in any relevant market.[6]

II. HGSI'S HISTORIC STRUCTURES TAX ACT ARGUMENTS COULD HAVE AND SHOULD HAVE BEEN ADDRESSED BY THE FOURTH CIRCUIT

VVL's contentions that HGSI's Historic Structures Tax Act arguments were "not preserved on appeal" and "relied on a demonstrably false premise about tax law" are patently false. (VVL Br. 20, 22.) In point of fact, HGSI's preservation tax law arguments were before the Fourth Circuit for determination, were founded on a correct understanding of applicable tax law, and remain integral to the proper disposition of this case. Indeed, absent consideration of the tax and preservation law concerns underlying the Grace Donations, what VVL characterizes (inappropriately) as the "highly unusual" facts of this case would be all but incomprehensible.

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requisite antitrust analysis should be on eliminating "restraints" on competitive activity, rather than foreclosing "benefits" to competitive actors.

[6] VVL's reliance on a string of factually distinguishable cases for the proposition that "knowing participation in an anticompetitive scheme suffices for liability even if one does not share the anticompetitive motive of the co-conspirator" should not control the Court's decision in this case. (VVL Br. 14.) Where, as here, the activities of the two alleged conspirators take place in different, non-overlapping spheres (one non-commercial, the other commercial), the relationship between the two parties is more akin to that of consumer and tying seller, circumstances under which the consumer (*i.e.*, the recipient of the allegedly anticompetitive donation) has never been subject to antitrust liability. *See generally* American Bar Ass'n, Section of Antitrust Law, I *Antitrust Law Developments (Fourth)* § I.D.3(a) (1997).

As set forth in the Petition, the Complaint alleges that Grace donated entire *or partial interests* in Green Springs land to HGSI subject to an alleged agreement between Grace and Historic Green Springs that such land would be used exclusively for conservation or preservation purposes (*i.e.*, not for mining) and that, in return, Grace received a "sizable tax deduction." (Compl. ¶ 25; *see id.* ¶ 99 ("Grace assigned to HGSI *substantially all* of Grace's interests" (emphasis added)).) Such a conveyance of a "qualified real property interest" to a "qualified organization," with conditions that ensure that the property will be used "exclusively for conservation purposes" plainly made Section 170(h)'s requirements for a "qualified conservation contribution" relevant to any judicial assessment of the Grace Donations.

The Fourth Circuit failed entirely to acknowledge the relevance of Section 170(h)'s requirements or the preservation policies those requirements served. Instead, it deemed subject to antitrust scrutiny the very act (*i.e.*, making a donation in conformity with Section 170(h)) that the Historic Structures Tax Act and related statutes expressly permitted and promoted. In so doing, the Fourth Circuit's decision created the type of conflict between two statutory schemes that has long qualified (VVL's current contentions notwithstanding) for certiorari review under the rubric of "important federal statutory issues." Robert L. Stern, et al., *Supreme Court Practice* § 4.13 (7th ed. 1993); *see, e.g., National Broiler Marketing Ass'n v. United States*, 436 U.S. 816, 820 (1978); *United States v. Coleman*, 390 U.S. 599, 601 (1968); *American Federation of Musicians v. Wittstein*, 379 U.S. 171, 175 (1964). Review should thus be granted to address this important question of statutory construction.

A. THE I.R.C. § 170(H) ARGUMENTS WERE BEFORE THE FOURTH CIRCUIT

VVL's contrary contentions notwithstanding, HGSI's I.R.C. § 170(h) arguments were plainly before the Fourth Circuit for decision. Indeed, the significance of these

policies and their role in the Grace Donations were raised before the Fourth Circuit in briefs filed by both HGSI and *amici curiae* National Trust for Historic Preservation and Land Trust Alliance (together, the "National Trust"). Thus, in its appellee's brief to the Fourth Circuit, HGSI argued that "[t]he federal antitrust laws should not be applied directly to contravene federal historic preservation policy, especially where, as here, the historic preservation statutes were adopted subsequent to the Sherman Act and thus impliedly repeal the earlier statute in the event of conflict." (Brief for Defendant-Appellee at 24.) Similarly, in its Petition for Rehearing, HGSI contended that the Fourth Circuit "failed to consider the conflict which its decision created between the Sherman Act and the National Historic Preservation Act." (Petition for Rehearing at 14.)

The amicus brief filed by the National Trust made these arguments, as VVL concedes, even more compellingly. (*See* Brief of Amici Curiae National Trust at 2 ("VVL's claims are inconsistent with the federal tax law requirement that qualified conservation easements must ensure prohibition of surface mining").) Indeed, the National Trust's brief presented this issue so persuasively that VVL felt obligated to take issue with I.R.C. § 170(h)'s relevance to this case in a Response to the Trust's Motion for Leave to file its amicus brief. VVL contended therein that the National Trust's "amicus brief ma[de] no attempt to explain how the law and policies governing qualified conservation easements has any bearing on [Grace's] transfers of fee simple interests and leases," to which the Trust responded that "[i]t is entirely within [the Fourth Circuit's] discretion to recognize that the essential nature of the restrictions on the challenged donation is that of a conservation easement." (VVL Response to Motion for Leave at 4; National Trust Reply at 4.) In light of this appellate level debate, in which VVL vigorously participated, it is incredible that VVL should now contend

that these arguments were never presented to the Fourth Circuit.

However, even if HGSI (as opposed to the *amici curiae*) had not fully tendered these arguments to the Fourth Circuit, this Court would still have discretion to consider them on appeal. VVL's boilerplate citations notwithstanding, the Court has many times "rel[ied] on factual information, cases or analytical approaches provided only by an amicus." *Supreme Court Practice* § 13.13; *see, e.g., O'Lone v. Estate of Shabazz*, 482 U.S. 342, 345 (1987); *Turner v. Safley*, 482 U.S. 78, 93, 95 (1987); *Maryland v. Craig*, 497 U.S. 836, 855-58 (1990); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 589 n.3 (1986) (Stevens, J., dissenting). On rare occasions, this Court has even decided cases on a ground "raised only in an amicus brief." *Teague v. Lane*, 489 U.S. 288, 300 (1989); *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991).

Indeed, even if neither HGSI nor the *amici* had presented the issues to the Fourth Circuit, this Court would not be precluded from addressing them now. While "[o]rdinarily this Court does not decide questions not raised or resolved in the lower court, this rule is not inflexible." *Youkaim v. Miller*, 425 U.S. 231 (1976). To the contrary, in a variety of "exceptional cases coming here from the federal courts," the Court has granted review to "questions not pressed or passed upon below." *Duignan v. United States*, 274 U.S. 195, 200 (1927); *see, e.g., Vachon v. New Hampshire*, 414 U.S. 478 (1974); *Pollard v. United States*, 352 U.S. 354, 359 (1957); *Terminello v. Chicago*, 337 U.S. 1 (1949).

Under any of these tests, this case would present the Court with the requisite "exceptional circumstances." As set forth *supra* and in the Petition, the Fourth Circuit's decision raises important issues of federal statutory construction and, unless reversed, will likely give rise to widespread confusion as to whether Section 1 of the Sherman Act limits or conditions the ability of commercial interests to make, and

non-profit organizations to accept, donations of land in conformity with Section 170(h) of the Internal Revenue Code. Guidance from this Court on the relationship between these two statutory schemes is essential to the future of charitable land donations in this country.

B. THE I.R.C. § 170(H) ARGUMENTS ARE CORRECTLY PREMISED

HGSI's I.R.C. § 170(h) arguments are also founded on a correct understanding of applicable tax law. VVL's current contentions to the contrary are based on both a wholesale misstatement of the Complaint's allegations and a patently incomplete account of the relevant tax code provisions and related IRS regulations.

VVL now claims that Section 170(h) is inapplicable to the present facts because it only applies where a donor gives away a "partial property interest," whereas here Grace gave away its "entire interest" in the Green Springs property. (VVL Br. 23.) However, this contention runs directly counter to the allegations of the Complaint, which claims no more than that Grace gave away "substantially all" of its property interests, and which concedes that the transfers to HGSI were made "subject" to agreements that allowed both Grace and certain third parties to retain "interests" in the donated land.[7] Accordingly, even if, as VVL now (incorrectly) argues, Section 170(h) only applied to

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[7] Each of the conveyances from Grace to HGSI related, *inter alia,* to parcels with respect to which prior owners arguably shared with Grace control of the future "extraction or removal of minerals" by surface mining. In suits consolidated with the VVL action below—and vigorously contested by Grace—members of the Peers families alleged that the original deeds conveying their property to Grace reserved to them a right of control over the "extraction" of vermiculite that was expansive enough to preclude Grace from extinguishing its obligations thereunder by donating the property to HGSI. *See* App. 12a-14a.

"contributions that 'consist of less than the taxpayer's entire interest in such property,'" the Grace Donations would fall within the ambit of Section 170(h). (VVL Br. 23.)

VVL's grasp of the applicable law, however, is no better than its recollection of the Complaint's allegations. VVL also now contends that "all that matters is that Grace gave away all of the interests it had in the property," and that it is consequently "irrelevant whether others have an interest in the same property." (VVL Br. 23 & n.15.) But Section 170(h) expressly contemplates, and prescribes mining restrictions that apply to, circumstances where "the ownership of the surface estate and mineral interests has been and remains separated"—with one interest in the donor and the other in an unrelated third-party. 26 U.S.C. § 170(h)(5)(B)(ii). Accordingly, as IRS regulations confirm, Section 170(h) restrictions on mining are required regardless of whether the donor *or* a third party (such as the Peers or the other original owners of the Green Springs property) retains an interest in donated property. *See* 26 C.F.R. § 1.170A-14(g)(4)(iii) (illustrating application of Section 170(h)(5)(B)(ii) with example where deductibility of donation of land in which "unrelated person" holds mineral interest is conditioned upon use restriction).

Based upon a correct understanding of the facts and applicable law, the relevance of Section 170(h) to any judicial assessment of the Grace Donations is not even debatable. Grace sought to make, and HGSI to accept, donations of Green Springs land. All things being equal, Grace might have sought to make these donations, as VVL suggests, based solely upon I.R.C. § 170(a). However, in light of the interests in these properties purportedly retained by the Peers families and others, the most prudent course for Grace to follow arguably would have been to document its donations in a fashion that would sustain scrutiny under either Section 170(a) or Section 170(h). By alleging that Grace made the Grace Donations "subject to express

restrictions forbidding mining," VVL asserted that Grace did precisely this, and VVL should consequently be estopped from claiming, in the context of this Petition, that "I.R.C. § 170(h) has nothing to do with the conduct in this case." (Comp. ¶ 38; VVL Br. 23.) To the contrary, Section 170(h) had as much or more to do with the facts of this case as any of VVL's allegations of a Sherman Act § 1 conspiracy between Grace and Historic Green Springs.

CONCLUSION

For all the foregoing reasons, as well as those set forth in the Petition, Historic Green Spring's petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

RESPECTFULLY SUBMITTED,

DENNIS C. O'DONNELL
Counsel of Record
SCHULTE ROTH & ZABEL LLP
900 Third Avenue
New York, New York 10022
(212) 756-2000

CHARLES H. MONTANGE
426 NW 162d Street
Seattle, Washington 98177
(206) 546-1936

Counsel for Petitioner

Of Counsel:

HARRY S. DAVIS
STEPHEN P. DAVIDSON

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